SUPREME COURT, U. S.

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FILED
JAN 30 1974
MICHAEL RODAK, JR., CLE

Nos. 73-645 and 73-651

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN ECONOMY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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Petitioner Cardillo contends that the evidence was insufficient to show that he joined the conspiracy, and petitioner Economy contends that the evidence was insufficient to support his conviction for knowing possession of goods stolen from interstate commerce. Both petitioners contend that the instructions did not require the jury to find that they had actual knowledge that the goods were stolen, and that the prosecutor's trial tactics were prejudicial.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner Cardillo was convicted of possessing goods stolen from interstate commerce, knowing them to have been stolen, and of concpiracy to commit that offense, in violation of 18 U.S.C. 659 and 371. Petitioner Economy was convicted of the Section 659 possession offense. Each petitioner was sentenced to three years' imprisonment, with all but six months suspended, and placed on probation for five years.[1] The court of appeals affirmed without opinion (Pet. App.).

Joseph Martorano testified at trial that on July 19, 1972, he and Emilio Iovino[2] stole fifteen crates of imported Japanese cigarette lighters from Pier 39, Brooklyn, New York (Tr. 84-95). The lighters were placed on Martorano's truck, and it was agreed that he would wait at a diner across the street from the pier until Iovino told him where to take them (Tr. 95-97). Iovino failed to contact Martorano that day, but on July 20, 1972, he told Martorano to wait at Joy's Pub, a bar about three blocks from the 39th Street Pier (Tr. 97-103). Shortly thereafter, petitioner Economy entered that bar and asked Martorano if he had the lighters. When he replied affirmatively, Economy told him to wait there because he might have a buyer, and then left the bar (Tr. 104-123). About five or ten minutes later, Economy returned with an unidentified individual. Economy handed Martorano a business card, told him to bring the crates to the address on the card, and

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[1] Petitioner Cardillo received identical, concurrent sentences on each of the two counts on which he was convicted.

[2] Martorano pleaded guilty prior to trial and testified for the government at trial. Iovino was tried with petitioners and acquitted.

assured Martorano that he would be paid (Tr. 124-126, 366-370, 1082-1084). Martorano then drove his truck loaded with the stolen crates to the address on the card—the Surprise Shop, Inc., Union and Court Streets, Brooklyn, New York, petitioner Cardillo's place of business (Tr. 144, 370-371, 1084, 1087-1088).

When Martorano arrived at the store he parked his truck in front, entered the store, and asked for the owner. He was directed to petitioner Cardillo. He introduced himself to Cardillo, showed Cardillo the card which Economy had given him and told Cardillo that he had fifteen crates for him. Cardillo told him to put the crates in the cellar and went outside and opened the cellar door. Martorano, Cardillo and a boy who worked for Cardillo began unloading the crates. After a couple of crates had been unloaded, Martorano was informed that there was a phone call for him, and he re-entered the Surprise Shop. Economy was the caller, and he told Martorano that the cops were all around (Tr. 144-146). Meanwhile, Waterfront Commission agents, who had been maintaining surveillance on Martorano's truck that day, observed Economy park across the street from the Surprise Shop, look up and down the street for several minutes and then enter a nearby luncheonette. An agent followed him into the lucheonette, observed him making a telephone call, and heard him telling the other party on the telephone that the cops were there (Tr. 372-378, 400-402, 1088-1089).

1. There was sufficient evidence to show that Economy had possession of the stolen goods (Economy Pet. 8-10). While the evidence does not show that Economy had actual possession of the goods, it does show that he exercised such dominion and control over their disposal that he had constructive possession of the contraband.

See *United States* v. *Casalinuovo*, 350 F. 2d 207, 209 (C.A. 2). On July 20, 1972, Economy ascertained from Martorano the location of the stolen merchandise. He directed the delivery of the goods and assured the driver that he would be paid for his services. He followed the contraband to its destination, spotted the watching authorities, and alerted his accomplices to the danger. This evidence was sufficient to show that Economy exercised dominion and control over the goods. See *United States* v. *Carneglia*, 468 F. 2d 1084, 1087 (C.A. 2); *United States* v. *Marquez*, 462 F. 2d 620, 621 (C.A. 9).[3]

2. The evidence was sufficent to show that Cardillo joined the conspiracy (Cardillo Pet. 13-16).[4] Martorano testified that, at Joy's Pub, Economy stated that he might have found a buyer for the lighters. Shortly thereafter, Economy gave him Cardillo's business card and told him to deliver the lighters to that address and to ask for the owner. He further told Martorano that payment was guaranteed. When Martorano presented the card to Cardillo and stated that he had fifteen cases, Cardillo immediately indicated that he knew what Martorano was talking about by directing him to put the merchandise in the cellar without seeking any indication as to what the crates might contain. Cardillo then proceeded to open the cellar door and to assist in

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[3] *United States* v. *Romano*, 382 U.S. 136, on which petitioner Economy relies, is inapposite. It involved the statutory inferences to be drawn under 26 U.S.C. 5601(b)(1) from mere presence at an illegal distilling site and did not consider the inferences which can permissibly be drawn from an individual's possession of recently stolen goods.

[4] Although Economy adopts Cardillo's contentions (Economy Pet. 10) this point is inapplicable to him, since Economy was not convicted of conspiracy.

moving the cases inside the shop. During the unloading, Cardillo presumably saw the shipping markings on the crates signifying their foreign origin, but at no time did Cardillo ever ask to see any shipping documents or inquire as to the contents of the crates. This evidence was sufficient for the jury to infer that petitioner Cardillo knew the contents and stolen nature of the crates and thus had knowingly joined the scheme to dispose of the contraband. Moreover, Cardillo's contention that the other conspirators would have delivered fifteen crates of cigarette lighters valued at $90,000 (Tr. 325) to him without his knowledge or consent was obviously not believed by the jury.[5]

3. Petitioners' contention (Cardillo Pet. 16-19, Economy Pet. 7, 10) that the instructions failed to charge the jury that they must find actual knowledge that the lighters were stolen is without merit. On the requisite knowledge element, the court charged as follows (Cardillo Pet. 18):

> The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the government need not present direct proof of what was in the defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods, recently stolen, unless that possession is explained, is in itself evidence from which

[5] Petitioner Cardillo does not challenge the sufficiency of the evidence supporting his conviction on the substantive possession count, on which he received a concurrent sentence. See *Barnes* v. *United States*, 412 U.S. 837, 848.

> you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen.

This instruction clearly and correctly charged the jury that they must find that the defendants actually knew that the lighters were stolen, and petitioners suggest no reason to believe that the jury disregarded those instructions.[6]

4. Petitioners' claim of prosecutorial misconduct (Cardillo Pet. 9-13; Economy Pet. 10) is insubstantial. The contention is that certain questions asked by the prosecutor concerning one Emmanuel Mangano were prejudicial. However, Mangano's name was first introduced by petitioner Cardillo during his direct testimony (Tr. 533), in which he explained that Mangano was both a joint owner of the Surprise Shop and a co-worker with Economy on the Brooklyn piers. In closing argument the defense argued that the unidentified man at the meeting at Joy's Pub could have been Mangano, and that the lighters might have been delivered to the Surprise Shop at his instigation rather than Cardillo's. Thus, it was the defense rather than the prosecution who attempted to interject Mangano into the case. Moreover, petitioners concede that no objection was made at trial to the questions which petitioners now assign as error.

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[6] Petitioners' reliance on *United States* v. *Fields*, 466 F. 2d 119 (CA. 2), is misplaced for, contrary to the charge here, there the jury was instructed that the government need not prove that the defendant knew the property was stolen but need only adduce evidence which tends to prove knowledge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.